A **BAHARUDIN AHMAD**

v.

PP

B HIGH COURT MALAYA, KANGAR
ZAMANI RAHIM JC
[CRIMINAL APPEAL NOS: 42-06-06 & 42-07-06]
27 NOVEMBER 2009

C ***CRIMINAL LAW:*** *Anti-Corruption Act 1997 - Soliciting for gratification - Demand of percentage or agreement to accept cash/cheque - Whether amounted to gratification - Whether there was sufficient evidence to show accused demanded percentage of 3% as contingency - Whether prosecution established prima facie case against accused - Whether accused*
D *failed to rebut presumption under s. 42(3) ACA 1997 - Whether there was reason to disturb convictions imposed by the Sessions Court Judge - Anti-Corruption Act 1997, ss. 10(a)(bb), 11(a)*

CRIMINAL LAW: *Penal Code - Section 165 - Accepting without consideration valuable things in connection with official functions -*
E *Ingredients - Prima facie case - Whether proved - Evidence of prosecution - Whether properly and adequately evaluated*

The accused was an officer of a public body, that was, Yang Dipertua, Majlis Perbandaran Kangar. The accused was charged
F with four principal amended charges which were (a) the accused on his own behalf solicited gratification for himself, that was, 3%, from the 10 million from one Nik Mokhtar Nik Hassan (SP1) as an inducement to himself as officer of a public body with promise for the approval of the proposal and assistance in ensuring the
G smooth running of the joint venture mixed housing development project which was an offence under s. 10(a)(bb) of the Anti-Corruption Act 1997; (b) the accused had agreed to receive gratification of RM25,000 as reward for the signing of the joint venture agreement which was an offence under s. 11(a) ACA: (c)
H that the accused had agreed to receive gratification of RM60,000 consisting of RM30,000 cash and RM30,000 in cheque as an inducement or reward which was an offence under s. 11(a) ACA and (d) the accused had accepted or obtained for himself a golf set for which the accused gave no consideration for it and that
I the valuable thing was known to the accused to have been concerned in a proceeding, or which had a connection with the official function of himself which was an offence under s. 165 of

the Penal Code. The Sessions Court judge found the accused guilty and convicted the accused on all the four principal amended charges. Dissatisfied with the whole judgment of the Sessions Court judge, the accused appealed. The prosecution appealed against the sentences of fines which were not in accordance with s. 16(b) of the ACA 1997.

Held (dismissing the accused's appeal on all the first, second, third and fourth principal amended charges; allowing the prosecution's cross appeal on sentences on fines in respect of the first, second and third principal amended charges):

(1) The issue that needed determination was whether the money and the cheque that was solicited and agreed to be received by the accused were gratification as an inducement or reward for the purpose stated in the first, second and third principal amended charges. Demand of percentage or an agreement to accept the cash and the cheque or loan was gratification.The accused could not escape by saying that it was a personal loan, as the meaning of gratification include loan under the Act. The Act did not distinguish a loan, whether it was personal or not. There was sufficient evidence to prove that the accused had demanded the percentage and had agreed to receive the cash and cheque from SP1. Moreover, the defence never disputed the fact that the accused demanded the percentage or agreed to receive the cash. There was sufficient evidence to show that the accused demanded the percentage of 3% as contingency and had agreed to accept the cash and cheque to fulfill the 3% that he had demanded. (paras 30 & 31)

(2) The defence of the accused, from the beginning, admitted the fact that he had recovered the money as stated in the alternative charges and the golf set as stated in the fourth principal amended charge. The defence admitted the accused was given the golf set by SP1 without any consideration, but said that it was borrowed. With that admission, the presumption under s. 42(3) of the 1997 Act was activated for all the relevant charges against the accused. Hence, it must be presumed that the accused had received the golf set without adequate consideration or in the words of the section "it must also be presumed that it was done with such knowledge as to the circumstances as set out in the particulars of the offence,

unless the contrary is proved". That aside, the act of 'loan' under the 1997 Act was an offence as it was an act tantamount to gratification according to s. 2, except when it was genuine or honest. Therefore, there was sufficient evidence and with the aid of the presumption, a *prima facie* case had been established for all the offences under s. 165 Penal Code. (para 62)

(3) The whole charges against the accused very much depend on the evidence of SP1. SP1 was a key witness for the prosecution. The Sessions Court judge having heard and observed SP1's demeanour while under severe cross examination found that SP1 was a truthful witness. Further, the Sessions Judge had evaluated the evidence of the prosecution's witnesses and concluded that their credibilities were intact. The Sessions Judge appreciated there were minor inconsistences in the prosecution evidence but those inconsistences were minor and did not go to the root of the charge. Thus, this court was fettered or not in a position to disturb the findings made by the learned Sessions Judge, that was, SP1 was an honest and straightforward witness. Under the circumstances, the prosecution had succesfully established *prima facie* case against the accused on all the charges - first, second, third and fourth principal amended charges. (paras 73, 75, 76, 89 & 90)

(4) The accused had failed to rebut the presumption under s. 42(3) ACA 1997 that had been rasied against him on the balance of probability. The accused had also failed to cast a reasonable doubt against the prosecution case and therefore the prosecution had succeeded in proving the case against the accused on the first, second, third and fourth principal amended charges beyond any reasonable doubt. There was no reason to disturb the convictions imposed by the learned Sessions Court judge on the accused. (para 109)

Case(s) referred to:

Ahmad Shah Hashim v. PP [1979] 1 LNS 4 FC ***(refd)***

Chandrasekaran & Ors v. PP [1970] 1 LNS 11 HC ***(refd)***

Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***

Foo Sam Ming v. Archi Environ Partnership [2004] 1 CLJ 759 CA ***(refd)***

Grace Shipping Inc & Anor v. CF Sharp & Co (Malaysia) Pte Ltd [1986] 1 LNS 60 PC ***(refd)***

Kanapathy v. Regina [1960] 1 LNS 167 ***(refd)***

Khoo Cheng Huat v. PP [1990] 2 CLJ 790; [1990] 2 CLJ (Rep) 236 HC ***(refd)***
Mazlan Leman v. PP [2002] 1 LNS 63 HC ***(refd)***
PP lwn. Zakaria Mansor [1996] 1 LNS 107 HC ***(refd)***
PP v. Abdul Rahman Mohamad [2005] 1 CLJ 700 CA ***(refd)***
PP v. Datuk Hj Harun Hj Idris (No 2) [1976] 1 LNS 97 HC ***(refd)***
PP v. Md Nor Hamid [2003] 1 LNS 591 HC ***(refd)***
PP v. Rosman Abdul Wahab [2006] 4 CLJ 615 HC ***(refd)***
PP v. Wan Razali Kassim [1970] 1 LNS 121 FC ***(refd)***
Seelan Muthaven v. PP [2002] 3 MLJ 640 ***(refd)***
Syed Ali Syed Abdul Hamid & Anor v. PP [1982] CLJ 188; [1982] CLJ (Rep) 340 FC ***(refd)***
Tan Ping Seng v. PP [1998] 1 SLR 418 ***(refd)***
Tindok Besar Estates Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
William Minggu Nyegang & Anor v. PP [2002] 8 CLJ 1008 HC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Yeo Hock Cheng v. Rex [1938] 1 LNS 118 HC ***(refd)***

Legislation referred to:
Anti-Corruption Act 1977, ss. 2, 10(a)(bb), 11(a), 16(b), 42(1), (3)
Evidence Act 1950, s. 8(2)
Penal Code, s. 165
Prevention of Corruption Act 1961, ss. 3(a)(ii), 4(a), 14
Street, Drainage and Bulding Act 1974, s. 70(1)

Other source(s) referred to:
Dr Sir Hari Singh Gour, *The Indian Penal Law of India*, p 1151
Ratanlal & Dhirajlal's, *Law of Crime*s, 24th edn, p 685

For the appellant/accused - Ismael Alabas; M/s Ismael Alabas & Hashim
For the respondent/prosecution - Mohamad Hanafiah Zakaria (Ishak Mohd Yusof with him) SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Zamani Rahim JC:

The Charges

[1] The appellant/accused ("accused") was charged with four principal amended charges and two alternative charges.

a) 1st principal amended charge

Bahawa kamu pada antara 5hb. dan 15hb. Februari 1999, di Pejabat Majlis Perbandaran Kangar, Perlis beralamat No. 192, Persiaran Jubli Emas, Kangar, di dalam Daerah Kangar, di

dalam Negeri Perlis sebagai pegawai sesuatu badan awam, iaitu Yang DiPertua Majlis Perbandaran Kangar, Perlis (MPKPs), dengan secara rasuah meminta suapan untuk diri kamu, iaitu 3% daripada RM10 juta, yang menyamai wang sebanyak Tiga Ratus Ribu Ringgit (RM300,000.00), kos pembangunan projek usahasama pembangunan perumahan bercampur Taman Singgahsana di atas Lot Pt. No. 44117, Mukim Titi Tinggi, Padang Besar, Perlis seluas lebih kurang 10 ekar kepunyaan Majlis Perbandaran Kangar, Perlis, daripada seorang bernama Nik Mokhtar bin Nik Hassan, sebagai dorongan kepada kamu dengan menjanjikan proses kelulusan cadangan projek tersebut, dan menjanjikan bantuan dalam kelicinan perjalanan projek tersebut dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 10(a)(bb) Akta Pencegahan Rasuah, 1997 (Akta No. 575) dan boleh dihukum di bawah seksyen 16 Akta yang sama.

b) 2nd Principal Amended Charge

Bahawa kamu pada 3hb Jun 1999 jam lebih kurang 1.30 petang, di dalam kereta WDT 399 di Jalan Syed Putra, Kuala Lumpur, di dalam Wilayah Persekutuan Kuala Lumpur, sebagai ejen Kerajaan Negeri Perlis, berjawatan Yang DiPertua Majlis Perbandaran Kangar, Perlis, dengan secara rasuah menyetuju-terima untuk diri kamu satu suapan, iaitu wang tunai sebanyak RM25,000,00 daripada Nik Mokhtar bin Nik Hassan sebagai suatu upah bagi melakukan suatu perbuatan berhubung dengan hal ehwal principal kamu iaitu menandatangani perjanjian usahasama dan menjanjikan bantuan dalam kelicinan perjalanan projek usahjasama pembangunan perumahan bercampur Taman Singgahsana di atas Lot PT. No. 4417, Mukim Titi Tinggi, Padang Besar, Perlis antara Majlis Perbandaran Kangar, Perlis dengan Sonati Development Corporation Sdn. Bhd., dengan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 11(a) Akta Pencegahan Rasuah, 1997 (Akta No. 575) dan boleh dihukum di bawah Seksyen 16 Akta yang sama.

Alternative 2nd Charge

Bahawa kamu pada 3hb. Jun 1999 jam lebih kurang 1.30 petang, di dalam kereta WDT 399 di Jalan Syed Putra, Kuala Lumpur, di dalam Wilayah Persekutuan Kuala Lumpur, sebagai penjawat awam, iaitu Yang DiPertua Majlis Perbandaran Kangar, Perlis, telah menerima untuk diri kamu suatu benda yang berharga iaitu wang tunai sebanyak RM25,000.00 dengan tiada balasan, daripada Nik Mokhtar bin Nik Hassan yang kamu ketahui ada hubungan dengan tugas rasmi kamu iaitu perjalanan projek usahasama

pembangunan perumahan bercampur Taman Singgahsana antara Majlis Perbandaran Kangar, Perlis dengan Sonati Development Corporation Sdn. Bhd. dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 165 Kamun Keseksaan (Akta 574).

c) 3rd Principal Amended Charge

Bahawa kamu pada 9hb. Julai 1999 jam lebih kurang 5.00 petang, di Pejabat Majlis Perbandaran Kangar, Perlis, beralamat No. 192, Persiaran Jubli Emas, Kangar, di dalam Daerah Kangar, di dalam Negeri Perlis sebagai ejen Kerajaan Negeri Perlis, berjawatan Yang DiPertua Majlis Perbandaran Kangar, Perlis, dengan secara rasuah menyetuju-terima untuk diri kamu satu suapan, iaitu wang berjumlah RM60,000.00 yang terdiri daripada wang tunai RM30,000.00 dan cek tunai BBMB no. 601402 sebanyak RM30,000.00, daripada Nik Mokhtar bin Nik Hassan sebagai suatu dorongan bagi melakukan suatu perbuatan berhubung dengan hal ehwal principal kamu iaitu menjanjikan bantuan dalam kelicinan perjalanan projek usahasama pembangunan perumahan bercampur Taman Singgahsana di atas Lot PT. No. 4417, Mukim Titi Tinggi, Padang Besar, Perlis, kepunyaan Majlis Perbandaran Kangar, Perlis antara Majlis Perbandaran Kangar dengan Sonati Development Corporation Sdn. Bhd. dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 11 (a) Akta Pencegahan Rasuah, 1997 (Akta No. 575) dan boleh dihukum di bawah Seksyen 16 Akta yang sama".

Alternative 3rd Charge

Bahawa kamu pada 9hb. Julai 1999 di Pejabat Majlis Perbandaran Kangar, beralamat No. 192, Persiaran Jubli Emas, Kangar, di dalam Daerah Kangar, di dalam Negeri Perlis sebagai penjawat awam, iaitu Yang DiPertua Majlis Perbandaran Kangar, Perlis, telah menerima untuk diri kamu suatu benda yang berharga iaitu wang tunai sebanyak RM30,000.00 dan cek tunai BBMB No: 601402 bernilai RM30,000.00 dengan tiada balasan, daripada Nik Mokhtar bin Nik Hassan yang kamu ketahui ada hubungan dengan tugas rasmi iaitu perjalanan projek usahasama pembangunan perumahan bercampur Taman Singgahsana antara Majlis Perbandaran Kangar dengan Sonati Development Corporation Sdn. Bhd. dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 165 Kanun Keseksaan (Akta 574).

d) 4th Principal Amended Charge

Bahawa kamu pada 27hb. Oktober 1999 jam lebih kurang 1.00 petang, di Kedai Tan Aik Hin, No. 51, Jalan Besar, Padang Besar, Perlis, di dalam Daerah Kangar, di dalam Negeri Perlis, sebagai penjawat awam, iaitu Yang DiPertua Majlis Perbandaraan Kangar, Perlis, telah menerima untuk diri kamu suatu benda yang berharga iaitu satu golf set jenis 'Mizuno' berharga RM2,500.00 dengan tiada balasan daripada Nik Mokhtar bin Nik Hassan yang kamu ketahui ada hubungan dengan tugas rasmi kamu iaitu perjalanan projek usahasama pembangunan perumahan bercampur Taman Singgahsana antara Majlis Perbandaran Kangar dengan Sonati Development Corporation Sdn. Bhd. dan dengan itu kamu melakukan kesalahan di bawah Seksyen 165 Kanun Keseksaan (Akta 574).

[2] Throughout the entire trial, the prosecution called a total of 17 witnesses to support the four principal amended charges together with two alternative charges as follows:

SP1 - Nik Mokhtar bin Nik Hassan
(Director of Sonati Development Sdn. Bhd.)

SP2 - Chin Choon Nee
(Vice President of Sonati Development Sdn. Bhd.)

SP3 - Khoo Boon Kor (Owner of golf shop)

SP4 - Teh Liang Si (Wife of SP3).

SP5 - Yeoh Choo Chi (Uncle Robert)
(person who stood guarantor for purchase of golf set)

SP6 - Nik Kamarulzaman bin Nik Ahmad
(Director of Sonati Development Sdn. Bhd.)

SP7 - Asmah binti Ismail (the accused's wife)

SP8 - Mohd Adib bin Zakaria
(Pentadbir Tanah, Jabatan Tanah & Galian, Perlis)

SP9 - Shahidan (person who accompanied to golf shop)

SP10 - Aziz bin Mahmood (Bank Officer)

SP11 - Azhar bin Hassan (Penolong Setiausaha, MPK)

SP12 - Abdul Zaidi bin Abdullah (Pegawai Penilaian, MPK)

SP13 - Harun bin Ariffin (Manager, Sonati Development Sdn. Bhd)

SP14 - Kassin bin Osman (BPR Officer)

SP15 - Puan Wan Norzanuar (Timbalan Pendaftar, Mahkamah Tinggi Perlis)

SP16 - Mohd Yatim bin Hashim (Investigating Officer, BPR)

SP17 - Mohd Suhaimi (Current Secretary of MPK)

On 8 July 2005 the defence was called and in his defence the accused called four witnesses including himself.

DW1 - Baharudin bin Ahmad (accused himself)

DW2 - Khoo Kok Ban

DW3 - CP Mahendran

DW4 - Johari bin Abdullah

[3] On 29 November 2006, the Sessions Court judge found the accused guilty and convicted the accused on all the four principal amended charges and sentenced the accused:

1) 1st Principal Amended Charge

four years imprisonment from the date of sentence and fine RM300,000 in default of which 24 months imprisonment.

2) 2nd Principal Amended Charge

three years imprisonment from the date of sentence and fine RM25,000 in default of which six months imprisonment.

3) 3rd Principal Amended Charge

four years imprisonment from the date of sentence and fine RM60,000 in default of which 13 months imprisonment.

4) 4th Principal Amended Charge
Fine RM20,000 in default of which four months imprisonment.

The imprisonment terms for the 1st, 2nd and 3rd principal amended charges were to run concurrently.

[4] Dissatisfied with the whole judgment of the learned Sessions Court judge and hence this appeal. The prosecution appealed against the sentences of fines which are not in accordance with s. 16(b) of the ACA 1997.

Ingredients For An Offence Under s. 10(a)(bb)

[5] The 1st principal amended charge against the accused was under s. 10(a)(bb) of the Anti Corruption Act 1997 (Act 575) (ACA 1997) which is in *pari materia* with s. 3(a)(ii) of the Prevention of Corruption Act 1961 (PCA 1961) (now repealed by the ACA 1997).

[6] There are several authorities pertaining to an offence under s. 3(a)(ii) of PCA 1961 which stipulated the ingredients that required to be proved by the prosecution to bring home the charge: see *PP v. Datuk Haji Harun Haji Idris (No 2)* [1976] 1 LNS 97.

[7] See also *Ahmad Shah bin Hashim v. PP* [1979] 1 LNS 4 and *PR v. Zakaria bin Mansor* [1996] 1 LNS 107.

[8] The prosecution was required under the PCA 1961 to prove all the ingredients by direct or circumstantial evidence. This is because the presumption under s. 14 of PCA 1961 does not include soliciting offence in s. 3 of PCA 1961.

[9] The law as it stands now under the ACA 1997, the presumption under s. 42(1) is applicable to the offence under s. 10(a)(bb). Therefore, the evidence of soliciting may attract the said presumption: see *William Minggu Nyegang & Anor v. PP* [2002] 8 CLJ 1008.

[10] In this case, for the 1st principal amended charge under s. 10(a)(bb), the ingredients that required to be proved by the prosecution are:

(i) The accused was an officer of a public body, that is, Yang DiPertua, Majlis Perbandaran Kangar (YDP MPK);

(ii) On or in between the dates stated in the 1st principal amended charge, the accused on his own behalf solicited gratification for himself, that is, 3% from the RM10 million which was equivalent a sum of RM300,000 from one Nik Mokhtar bin Nik Hassan;

(iii) The gratification was solicited corruptly;

(iv) The accused solicited the gratification as an inducement to him as officer of a public body with promise for the approval of the proposal and assistance in ensuring the smooth running of the joint venture mixed housing development project known as Taman Singgahsana, on Lot PT. No. 4417, Mukim Titi Tinggi, Padang Besar, Perlis, which was a 10-acre area, in which Majlis Perbadaran Kangar (MPK), Perlis was involved.

[11] The ingredients (i) and (ii) stated above are required to be proved by direct evidence, however, by virtue of the presumption under s. 42(1), gratification is presumed to be solicited corruptly in respect of ingredient (iii) and an inducement as stated in ingredient (iv), unless rebutted by the accused.

Evidence Relating 1st Principal Amended Charge

[12] In respect of this charge, the prosecution relied on the evidence of SP1:

(i) The accused had discussion with SP1 to develop a piece of land belonging to MPK at Padang Besar. SP1 made survey study of the land and subsequently forward a proposal to jointly develop the land with MPK. The proposal was made by Permatang Bina Sdn Bhd (PBSB) through a letter dated 8 February 1999, P2 addressed to YDP MPK, who during that time was the accused.

(ii) The letter, P2 estimated the cost of the project to be about RM8 million with estimated returns of 15% to MPK in the form of premium cost for the land and 1.5% from the sale of houses. For the purpose of carrying this project, PBSB formed Sonati Development Corporation Sdn. Bhd (Sonati) to carry out the construction works.

(iii) Subsequently, SP1 received a reply from MPK through the letter, P3 wherein MPK agreed in principle with the proposal put forward by PBSB and has requested PBSB to provide a complete proposal. This letter was signed by the accused.

[13] The accused had made the decision to approve in principle the proposal when the project was still at an embryonic stage. This can be seen from the notation on the proposal letter, P2 and

A the reply, P3. There is no evidence that the accused has sought the opinion of any of the working committee or the MPK Council on the matter before agreeing in principle to the matter.

[14] Regarding the act of soliciting for the 3%, SP1 testified that
B the accused had asked the money for contingency amounting to 3% be included in the development cost. Initially, SP1 did not know the purpose of the contingency money because the accused did not tell him. He was however told subsequently that the money was for the contribution that needs to be made. As the
C result of this request, SP1 had included 3% as contingency cost. According to SP1, this 3% was an additional to the contingency cost of 5% that is normally considered when planning for a project. SP1 further add that by this, the development cost for Sonati went up 3% and the profit went down by 3%. This
D reduction in profit would be bored by Sonati.

[15] SP1 could not recall exactly when the accused asked for the 3% to be included as contingency cost. He recalled of the request made in the series of discussion he has had with the
E accused in Kuala Lumpur and Kangar between 5 and 15 February 1999.

[16] SP1 testified that the percentage in term of money represented RM300,000. The whole of the project was estimated to cost RM10 million, a value higher then initially estimated in his
F letter, P2 wherein he estimated at RM8 million.

[17] The prosecution contended that the request of 3% by the accused is a soliciting made corruptly by the accused because - firstly, it is outside the 5% contingency cost normally considered
G by SP1 in determining the cost for the development of a development project; secondly, at the time when the demand was made, the council has not yet decided on the proposal. The council only sat on 25 February 1999 when it decided to approve the project; and thirdly, the accused was the chairman of this
H council meeting. It clearly shows that when the accused requested SP1 to include 3% as contingency, it is a gratification as an inducement for the accused to assist in the approval of the proposal and the smooth running of the project by SP1's company where MPK is also involved.

I **[18]** The prosecution submits that there is sufficient evidence to prove the offence under s. 10(a)(bb) of the ACA 1997 which had been committed by the accused.

Ingredients For An Offence Under s. 11(a)

[19] For the 2nd and 3rd principal amended charges are both under s. 11(a) of the ACA 1997 which is in *pari materia* with s. 4(a) of PCA 1961 (now repealed by the ACA 1997): The ingredients to be proved under s. 4(a) of PCA 1961 are stipulated by Low Hop Bing J (as he then was) in *PP v. Md Nor Hamid* [2003] 1 LNS 591.

[20] In the instant case, the ingredients that must be proved by the prosecution against the accused for the offence under s. 11(a) are as follows:

i) the accused has agreed to receive the gratification,

ii) when the accused received the gratification he was an agent to the State Government of Perlis holding the position of YDP MPK.

[21] Upon establishing the above two ingredients, the presumption under s. 42(1) is invoked, that is, the gratification is presumed to have agreed to accept corruptly as reward for the signing the joint venture agreement and the promise to assist in the smooth running of the implementation concerning the 2nd principal amended charge and as reward for the joint venture housing development project Singgahsana between MPK and Sonati Development.

Evidence Regarding 2nd Principal Amended Charge

[22] For the 2nd principal amended charge, the prosecution relied wholely on the evidence of SP1 and SP2.

(i) SP1 testified that a week before the signing of the joint venture agreement between MPK and Sonati, P4 at the office of Messrs R.R. Chelliah & Co in Kuala Lumpur. SP1 had received a telephone call from the accused directing SP1 to prepare RM25,000 to be handed to the accused after the signing of the agreement.

(ii) During this time, SP1 understood that the money was part of the money allotted as contingency fund which was the 3%. During the conversation, SP1 was told by the accused that he wanted to go to Myanmar and that he wanted the money to be handed to him.

(iii) Based on the instruction, SP1 used part of the money that he received as "earnest deposit" from the contractor. The money was in RM100 denomination and was tied with rubberband and was kept in a courier plastic envelope and was not glued.

(iv) After the signing of the agreement, SP1 together with SP2 and the accused were in the same car which was driven by SP2. They were on the way for lunch at Raju Restaurant in Petaling Jaya that SP1 handed the envelope containing the money to the accused. At that time, the accused was seated in front beside the driver and SP1 was seated at the back seat.

(v) When SP1 was about to hand over the envelope, the accused asked SP1 as to how much and SP1 said it was RM25,000. Then, the accused held the envelope and took it from SP1. To his memory, the accused did not open the envelope.

(vi) SP2, who was the driver, testified saying that he saw SP1 handed an envelope to the accused. SP2 stated that he knew of the content as the day earlier, he helped in counting the money with SP1 in the latter's office. At that time, he was told by SP1 that the money would be given to the accused.

(vii) SP2 testified that the accused did ask of the amount and SP1 answered that it was RM25,000.

(viii) SP1 saw the accused holding the envelope when they reached the restaurant.

(ix) Evidence was adduced that the car had a clock and that the time shown was 1.30pm and they were at Jalan Syed Putra, Kuala Lumpur.

(x) After the lunch, SP1 and SP2 went off in SP2's car whilst accused went off in SP13's car.

[23] The evidence of SP1 and SP2 were consistent with each other regarding the event in the car and this fact was not disputed by the accused.

Evidence Regarding 3rd Principal Amended Charge

[24] The prosecution relied on the following evidence:

(i) SP1 testified that on 9 July 1999, there was a ceremony with the buyers at MPK's branch office in Padang Besar. The accused was present during the ceremony.

(ii) After the accused had given a speech, he approached SP1 and requested SP1 to prepare RM60,000 to be handed to him.

(iii) The accused informed SP1 that he needed the money to pay for the car instalment and for the credit card. SP1 testified that this money was part of the 3% demanded by the accused.

(iv) SP1 testified that the request was sudden. He discussed the request with SP2 and they decided to approach the accused and informed him that Sonati did not have sufficient fund to pay the RM60,000 that the accused requested for. They decided to tell the accused that Sonati only had money in the stakeholder's account.

(v) After explaining the circumstances to the accused, the accused insisted that the money be paid. He emphasized that if court action was taken against him, it might affect his position as YDP MPK. A new one would be appointed in his place, thus he would not be in a position to help the joint venture project.

(vi) As a result of this, SP1 did not have much choice but to think of the way in which he could fulfill the request.

(vii) Incidentally, SP6 was in Perlis and Sonati's account at BBMB branch in Kangar had RM30,000 in the account. SP1 requested SP6 to withdraw RM30,000 from the account. From this money, SP1 took RM20,000 from SP6 because he had cash of RM10,000. SP1's evidence was corroborated by SP6 in regard to this.

(viii) Thereafter, SP1 and SP2 met the accused at the latter's office in MPK, Kangar. Before the money was handed to the accused, SP1 explained to the accused that he would be giving RM30,000 only and that Sonati did not have sufficient fund to give RM60,000. However, after discussing

with the accused, SP1 issued a cash cheque of RM30,000 to be paid at a prospective date. The accused also agreed to accept the initial cash for RM30,000.

(ix) Following this, SP1 directed SP6 to prepare a cash cheque, P6 for RM30,000 and SP1 signed it. Before leaving for Kuala Lumpur, SP1 handed the cheque, P6 to the accused.

(x) The cheque, P6 was dated 12 July 1999 even though it was issued on 9 July 1999. It was cashed on 12 July 1999 by SP7, the accused's wife.

(xi) SP1 did not know or had any dealing with SP7 on the date the cheque, P6 was cashed, but on one occasion subsequent to the date, he had met SP7 at City Bayview Hotel in Penang.

(xii) SP7 testified that the cheque, P6 was given by the accused on 12 July 1999 and that she went to cash it at the Bank Bumiputra of Kangar branch on the same date. She was told by the accused that the cheque, P6 was given by Nik Mokhtar, SP1. After cashing the cheque, P6 she handed the RM30,000 to the accused.

(xiii) SP1 handed the cash of RM30,000 and the cheque, P6 on two different occasions but it was on the same date, that is, on 9 July 1999. The date was confirmed by SP1 basing on the date of the cheque, P6 but P5 which showed the date 9 July 1999 and on 12 July 1999, the cheque was cashed by SP7. It fell on Friday and took place at the accused's office at MPK Kangar after the Friday prayers. According to SP1, the cash was handed between 3 - 3.30pm whilst the cheque, P6 was handed before he departed for Kuala Lumpur.

The evidence of SP1 pertaining to the giving of cash amounting to RM30,000 and cash cheque, P6 for the same amount was corroborated by the evidence tendered by the accused himself which was D37. It supported the fact that Sonati did not have sufficient fund in its account. The letter was dated 5 July 1999 and it showed that Sonati had a balance of RM31,940 which was enough to pay half of what was demanded by the accused, that is, RM60,000. This fact supported SP1 when he told the court that Sonati did not have sufficient fund to pay the accused.

D37 also showed that on 9 July 1999, there was a withdrawal of RM30,000 leaving a balance of RM1,940. This supported SP1 when he testified that he gave cash of RM30,000 to the accused. It also explained as to why SP1 had to issue the cheque, P6 to the accused in order to fulfill the accused's demand on that date.

Further D37 showed that on 10 July 1999, which was on Saturday, there was a deposit of RM58,928.13 into Sonati account which enabled the cheque, P6 to be cashed on the 12 July 1999. This corroborated SP1 on the reason why the cheque, P6 was given the date 12 July 1999. On this point, the case of *Foo Sam Ming v. Archi Environ Partnership* [2004] 1 CLJ 759, Gopal Sri Ram JCA (as he then was) said:

> However, our attention was drawn by counsel for the respondent to contemporary documentary evidence in the appellant's own hand that contradicted his *viva voce* testimony. The learned judge approached the question of appointment by preferring the contemporaneous documents to the rather tenuous and tardy and unconvincing oral explanations given by the appellant on oath. This is how she put it.
>
> Thus after scrutinizing the oral evidence of the two main actors namely PW1 and DW1 I am of the opinion that there are two conflicting versions as regards the alleged appointment of PW1. However when the two versions are compared with the documentary evidence and the conduct of the two parties, I find that PW1's version is more probable. In fact DW1's own oral testimony also shows that he was very interested in engaging PW1. This can be seen from the elaborate discussions between the parties; the fact that DW1 had given PW1 all the relevant documents pertaining to the two pieces of property, namely Lot 1578 & Lot 7272, and the fact that DW1 wrote to PW1 urging him to complete the plans for submission, (see exhs. P2, P3, P4, P7, P8, P9, P11, P12, P13, P14 and P16). Furthermore, from exhs. P12, P13 and P14, it is clear that the defendant acknowledged receipts of the plans, yet he said he was not interested in them. I find this difficult to believe as no reasonable person would accept anything that he/she does not want. I also cannot accept DW1's evidence that the plans were to be submitted to Jabatan Perancangan for approval in principle only, as his own

witness, DW2, an officer from Jabatan Perancangan had given evidence that the proper procedure was to submit the plans for approval, to MPJB.

Was she right in this approach? I think that she was. There are a number of authorities from which support may be drawn for such an approach that the trial judge here adopted. It sufficient that I quote from two of them.

[25] His Lordship Gopal Sri Ram JCA (as he then was) went on to cite firstly, *Tindok Besar Estates Sdn Bhd v. Tinjar Co.* [1979] 1 LNS 119 and secondly, *Grace Shipping Inc & Anor v. CF Sharp & Co (Malaysia) Pte Ltd* [1986] 1 LNS 60.

[26] In considering the issue of SP1's credibility, the trial court considered the contemporary documents and compared them with his oral evidence. A close scrutiny of SP1 oral testimony with the document tendered by the defence, there is no reason to doubt, which the learned Sessions Court judge had agreed, with the evidence of SP1 and that he was a truthful witness. Therefore based on these evidence, the prosecution has succeeded in proving on the date and time and place stated in the 3rd principal amended charge, the accused has agreed to receive for his behalf a cash of RM30,000 and a cash cheque of RM30,000 from SP1,

Evidence That The Accused Had Corruptly Solicited Or Agreed To Receive Gratification

[27] The issue that need to be determined is whether the money and the cheque, P6 that was solicited and agreed to be received by the accused were gratification as an inducement or reward for the purpose stated in 1st, 2nd and 3rd principal amended charges.

[28] In order to prove this ingredient, the prosecution relied on two parallel mode of proof, that is, by adducing direct evidence and by relying on the presumption under s. 42 of the ACA 1997. In the case of *Seelan a/l Muthaven v. PP* [2002] 3 MLJ 640, Jeffrey Tan J said.

Most definitely, when it close its case, the prosecution/respondent had proved the two ingredients of the offence under s. 4(a) to which s. 14 of the Act applied, that is: (i) that a gratification was accepted by the appellant: and (ii) that the appellant was at the time of acceptance of the gratification in the employment of a public body. 'Upon proof of those two ingredients, the existence of the third ingredient that the gratification was paid or given or

received corruptly as an inducement or reward for doing or forbearing to do an act in relation to the affairs is to be presumed unless the contrary is proved (*PP v. Yuvaraj* [1968] 1 LNS 116)

[29] Gratification is defined in s. 2 of the ACA 1997 as follows.

'Gratification' means:

(a) Money, donation, gift, loan, fee, reward valuable security, property or interest in property being property of any description whether movable or immovable, or any other similar advantage;

(b) Any office ...;

(c) Any payment, ...;

(d) Any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;

(e) Any forbearance ...;

(f) Any other service or favour ...;

(g) Any offer, ...;

[30] A demand of percentage or an agreement to accept the cash and the cheque or loan is gratification under this definition. The accused could not escape by saying that it was a personal loan, as the meaning of gratification include loan under the Act. The Act did not distinguish a loan, whether it is personal or not.

[31] There is sufficient evidence to prove that the accused had demanded the percentage and had agreed to receive the cash and cheque from SP1. Moreover, the defence never disputed the fact that the accused demanded the percentage or agreed to receive the cash. Instead the accused merely disputed the amount. The defence exh. D19 strengthened SP1 evidence on all material particulars. Hence, there is sufficient evidence to show that the accused demanded the percentage of 3% as contingency and had agreed to accept the cash and cheque to fulfill the 3% that he had demanded. In the case of *Mazlan Leman v. PP* [2002] 1 LNS 63 Mohd Ghazali J held:

Dismissing the appeal: (1) the prosecution/respondent had proven that: (a) the accused was an 'agent' as defined in s. 2 of the Act because the accused was DBKL's enforcement assistant and DBKL was public body: and (b) the accused had, whilst as

DBKL's agent, corruptly received gratification as an inducement for not confiscating SP6's wares. Further the deeming provision in s. 42(1) of the Act, which provided that any gratification received by a person shall be deemed to have been corruptly received as an inducement in respect of matters stated in the charge until the contrary was proved, was invoked against the accused. Accordingly, the prosecution/respondent had established a *prima facie* case against the accused".

[32] On the issue of RM50,000 which was admitted as not being true by SP1, he had explained it and there is no reason to doubt it. SP1 admitted that it was not true because the actual amount was RM60,000. SP1 could not remember as to the reason why he wrote RM50,000 but at that time he knew it was more than RM50,000.

[33] SP1's admission with regard to the RM50,000 must not be taken out of context. What was meant by SP1, the amount was not correct. This does not mean SP1's evidence should be rejected and his credibility is shakened. The difference is only in respect of the amount but not the fact that the accused had received the money.

[34] SP1 testified that the accused told him if SP1 did not help him, the accused position as YDP would be affected and the accused would not be able to assist SP1 in the smooth running of the joint venture project.

[35] The evidence clearly showed that the accused had agreed to accept the money and cheque from SP1 and it was clearly a bribe as an inducement to assist SP1 in ensuring the smooth running of the joint venture project. The assistance given by the accused was clearly shown when SP1 was able to start with the earth works and building construction works before the plan was submitted for the approval by MPK.

[36] In the letter of termination of the joint venture agreement, P9, it was stated therein of four terms and conditions that were breached. It refers to the agreement, P4 made on 14 June 1999. Evidence was shown that MPK did not take actions against Sonati. It was not until the notice to stop work was issued through the letter dated 25 February 2000, P11 and subsequently the termination letter, P9. Prior to that, on 3 February 2000, only one letter, D14 was issued requesting for documents from Sonati. This showed that MPK only took actions against Sonati only in February 2000 for failure to comply with the terms and conditions

of the agreement. If one is to look at the termination letter, action should have been taken within one month from the date of the agreement since Sonati had failed to apply and submitted plans as stated in para. (b). All these showed that there was an agreement given by the accused to SP1 so that MPK would not take any action against Sonati so as to ensure the smooth running of the project.

[37] The agreement to receive the RM25,000 by the accused from SP1 was as a reward to the accused for signing the joint venture agreement, P4 besides the assurance for the smooth running of the works on the project. Hence, according to SP1, immediately after the launching on 27 May 1999, Sonati had started the earth works even though there was no lawful agreement between MPK and Sonati. Therefore, the RM25,000 was a reward to the accused, even though the agreement had yet to get the approval of MPK council.

[38] According to SP1, immediately after the launching in May 1999, Sonati had started the work on the project. SP2 testified that the launching took place on 27 Mei 1999. On 29 February 2000, through MPK's letter, P11 dated 11 February 2000, Sonati was directed by MPK to immediately stop the works on the project.

[39] By MPK's letter dated 14 April 2000, P9, SP1 was informed that on 8 April 2000, MPK had decided to terminate the agreement between MPK and Sonati. Based on the termination letter, MPK should have taken actions on Sonati. But, there was no action taken against Sonati up until the month of February, when MPK issued the notice to stop work dated 25 February 2000, P11 and subsequently termination letter dated 14 April 2000, P9. These corroborated SP1's evidence that the money was an inducement to the accused to assist Sonati with the project.

[40] The prosecution has also tendered the minutes entitled "Minit Mesyuarat MPK Kali Ke 2 Tahun Ke 20 1999" for the meeting on 25 February 1999 at 9am at Dewan Mesra MPK, P30. The accused chaired the meeting and it was his first council meeting as reflected in the minutes at para. 2.1. During this meeting, the accused presented Kertas MPK Ps. Paper No: 4/99 which contained the proposal to develop the lands belonging to MPK through joint venture with PNSB (p. 10) and it was unanimously approved.

[41] Beside direct evidence to prove the ingredient of "doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned" as required in s. 10(bb) and "doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavor to any person in relation to his principal's affairs or business" as stated in 1st, 2nd and 3rd principal amended charges, this fact is not required to be proved by the prosecution because the presumption under s. 42(1) is invoked against the accused in relation the fact.

Contingency Cost Of 3% Is Not Part Of The Joint Venture Agreement

[42] The demand of the 3% by the accused as contingency money and the giving and agreeing to receive of the money through cash of RM25,000, RM30,000 and the cheque of RM30,000 were not part of the joint venture agreement, P4.

[43] SP1 testified that the 3% contingency money was not a term and condition of the agreement, P4. Initially, SP1 understood the money as Sonati's contribution from the profit of the joint venture to be channeled to political funds, schools and so on. It was when the accused requested for the money and when the accused received it that he knew of the purpose of the contingency money.

[44] The RM25,000 payment was also not part of the 10% that was required to be paid by Sonati immediately after the agreement was assigned in accordance with the fourth schedule of the agreement, P4. According to SP1, the 10% under the agreement was paid to MPK. SP1 testified that the money that was agreed to be received by the accused was the 3% contingency money which was determined and demanded by the accused.

The Repayment By The Accused

[45] The prosecution had adduced evidence of the meeting at Hotel City Bayview di Pulau Pinang where the accused returned a cash of RM30,000.000 to SP1.

[46] Two or three days earlier, the accused called SP1 through the phone requesting SP1 to meet him at the said hotel. On the date agreed by them ie, on 6 April 2000 at 6.45pm, SP1 and SP2 went to the hotel and they arrived earlier than the accused.

[47] After waiting for a while, the accused came with his family and they met at the hotel lounge. Later, SP1 and the accused moved to another table where the accused requested SP1 to draft a letter stating that SP1 had given the accused a personal loan of RM30,000 and that the accused was repaying the said sum that day. The accused also requested that the date of the letter be backdated to the month of December 1999. SP1 and the accused then went to the hotel counter for a piece of paper and SP1 drafted the letter that was asked by the accused. This letter, exh. P7 was entitled "perakuan penerimaan bayaran balik pinjaman peribadi". Subsequently, SP1 signed the letter, P7 and the accused took it and handed a cash of RM30,000 to SP1. Earlier, SP1 made a copy of P7 and he later made some notes on the copy stating the actual date of the incident.

[48] Assuming it was true that the accused was making the repayment for the loan taken from the SP1, why then did he only make payment for RM30,000 and not the whole of the loan taken from SP1.

[49] It may be observed that during cross-examination of SP1, it was put to SP1 that the money was given by SP1 to the accused as personal loan based on P7. By this cross-examination, the accused admitted receipt of the money.

[50] It was argued by the prosecution that the accused took action to repay only the RM30,000 because of the cheque, P6 which was cashed by his wife, SP7 and this was a mistake by the accused and that he felt the need to cover this up by making it as a personal loan.

[51] The evidence of Abduzaidi b Abdullah, SP12, who prepared the proposal paper P39A, which showed that on 28 March 2000 the accused already knew about the proposal to terminate the joint venture agreement between MPK and Sonati he knew it when he chaired the finance and administrative committee. This can be gathered from the minutes of the meeting, P32 at p. 57 especially at p. 62. This clearly explained why the accused wanted to make the repayment for the money that he had accepted through the cheque, P6. The termination was a time bomb for the accused because besides terminating the joint venture, MPK was also appointing Hosana Construction Sdn Bhd to take over the joint venture project, the very company that Sonati had terminated the agreement that they have had with Sonati.

[52] The appointment of Hosana was bizarre because according to SP12, Hosana did not make any proposal to MPK for them to be appointed in place of Sonati. SP1 gave evidence that the accused had directed him to hand over the project to MPK.

[53] Another peculiar feature was the reason why the letter, P7 was given a retrospective date, that is, 15 December 1999 and not the actual date. The defence did not deny that the repayment took place on 6 April 2000.

[54] The receipt of corrupt money of cash amounting to RM25,000 took place on 3 June 1999 and another cash of RM30,000 and cash cheque of RM30,000 took place on 9 July 1999, that is, within one month between the first receipt and the second. Since then, there was no other receipt except for the golf set on 27 October 1999. If one is to calculate the percentage of 3% out of RM10 million, based on SP1 evidence, the accused should have received RM300,000, but the accused only received RM85,000 and there was a balance of RM225,000. Since 9 July 1999, SP1 did not make any further payment to the accused and this might caused unhappiness to the accused.

Evidence Showing The Role Played By The Accused in Terminating The Joint Venture Agreement

[55] The prosecution evidence showed that the accused played an active role to terminate the joint venture agreement. The role was played behind the scene by the accused.

[56] The grounds given by MPK in terminating the agreement were without basis. Clause 4(b)(i)(ii)(iv) that was mentioned in cl. 6(c) where MPK stated as the basis to terminate the agreement did not exist at all. There was no legal action taken against Sonati for the breache of s. 70(1) Akta Jalan, Parit dan Bangunan 1974. MPK also relied on cl. 23 but there was not mention as to who was the "developer" in the clause. Paragraph (b) stated that Sonati had failed to apply and submit the plans within one month, but there were minutes of the meeting which approved the plans. The effect of all these made the grounds given by MPK to terminate the joint venture agreement as being flimsy. These were major issues and it was unlikely that the accused did not know of it when he was the YDP MPK and the prime mover of the joint venture development.

[57] SP1 testified to show that the accused had on several occasions called him. In one of the meeting in Legend Hotel in Kuala Lumpur, the accused had requested SP1 to hand over the joint venture project and to end the agreement. SP1 testified stating that the accused had asked him for the acceptable sum to be compensated if the project was given back to MPK. SP1 had no intention to let go the project as it was well received and that he had started work on it. Hence when the accused insisted to know the amount, he mentioned the price of RM1 million if the project was to be handed back to MPK.

The 4th Principal Amended Charge

[58] The 4th principal amended charge and the 2nd and 3rd alternative charges are under s. 165 of the Penal Code (PC). In this case of *PP v. Rosman Abdul Wahab* [2006] 4 CLJ 615, in order to establish a *prima facie* case for the charges under s. 165 PC, the prosecution must prove the following essential ingredients:

a) The accused was a public servant;

b) The accused accepted or obtained or agreed to accept or attempted to obtain, for himself or for other person, a valuable thing;

c) The accused gave no consideration for it, or gave a consideration which he knew to be inadequate; and

d) SP1 from whom the accused accepted, etc the valuable thing was known to the accused to have, or to be, or to be likely to be concerned in a proceeding or business transacted or about to be transacted by himself, or which had a connection with the official function of himself, of a public servant to whom the accused was subordinate or from a person known to the accused to be interested in, or related to, the person so connected.

[59] The main principle for the offence under s. 165 PC is stated in the Ratanlal & Dhirajlal's, *Law of Crimes*, 24th edn as p. 685 (bottom) as follows.

> Where no such close connection exists, the receiving of large presents by a public functionary is generally a very suspicious proceeding. The court must interpreted s. 165 according to its plain language without in any manner being anxious or astute to

A narrow down its interpretation. Section 165 must be construed in a manner which would advance the remedy and suppress the mischief which is intended to curb. Section 165 is wider than s. 161 and that an act of corruption not falling within s. 161 may yet come within the wide term of s. 165, s. 165 is so worded as to cover cases of corruption which do not come within s. 161, 162 or 163. The difference between the acceptance of a bribe made punishable under s. 161 and s. 165 is that under the former section the present is taken as a motive or reward for abuse of office; while under the latter section the question of motive or reward is wholly immaterial and the acceptance of a valuable thing without ..., is forbidden because though not taken as motive or reward for showing any official favour, it is likely to influence the public servant to show official favour to the person giving such a valuable thing.

[60] In "*The Indian Penal Law of India*" by Dr. Sir Hari Singh Gour, at p. 1151 it was stated:

> What this section prohibits is the acceptance of a valuable present by a public servant from a present or prospective litigant or applicant, with whom he has no other connection. In other words, the acceptance of the present when traceable to a corrupt motive is what is intended to be made punishable here.

Admission By Defence

[61] The defence of the accused, from the beginning, admitted the fact that he had received the money as started in the alternative charges and the golf set as stated in the 4th principal amended charge. This may be observed in the manner the defence cross examined the prosecution witnesses.

[62] The defence admitted the accused was given the golf set by SP1 without any consideration, but said that it was borrowed to him. With that admission, the presumption under s. 42(3) of the 1997 Act was activated for all the relevant charges against the accused. Hence, it must be presumed that the accused had received the golf set without adequate consideration or in the words of the section "it must also be presumed that it was done so with such knowledge as to the circumstances as set out in the particulars of the offence, unless the contrary is proved".

[63] That aside, the act of "loan" under the 1997 Act is an offence as it is an act tantamount to gratification according to s. 2, except when it is genuine and honest.

[64] Therefore, there is sufficient evidence and with the aid of the presumption, a *prima facie* case has been established for all the offences under s. 165 PC.

Credibility Of Prosecution Key Witness, SP1

[65] The whole charges against the accused very much depended on the evidence of SP1. SP1 is a key witness for the prosecution. The learned counsel submitted that several times were shown how SP1 was lying and contradicted by his own witness. The credibility of SP1 when tested against the other prosecution and documentary evidences before the court clearly showed SP1 was not a truthful and credible witness. The learned counsel went on to cite the case of *Khoo Cheng Huat v. PP* [1990] 2 CLJ 790; [1990] 2 CLJ (Rep) 236 where the court held that:

> A witness cannot be regarded as a split personality as worthy of credit at one moment and untrustworthy at another

[66] It is trite law, where findings of the trial court depend on an assessment of the credibility of witnesses an appellate court must be extremely slow to disturb findings which are based on of facts and assessment of witnesses credibility.

[67] In *PP v. Abdul Rahman Mohamad* [2005] 1 CLJ 700, at p. 707, the Court of Appeal held:

> Whether or not SP6 consented to the sexual intercourse with the respondent is a question of fact which must be decided on the evidence adduced at the trial. The appellate court must be and is always slow to disturb the decision of the trial judge based on credibility of witnesses unless it is convinced that the decision was plainly wrong and was against the weight of evidence. The Privy Council in *Caldeira v. Gray* [1936] 1 MLJ 137 said that the functions of the appellate court are limited in their character and scope when dealing with question of fact and a question of fact in which question of credibility are involved, and that in an appeal from the decision of a trial judge based on his opinion of the trustworthiness of witness whom he had seen, the appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. This principle has been adhered to by our court all these years and was quoted in extenso by the Federal Court in *Dato' Mokhtar bin Hashim v. PP* [1983] 2 MLJ 232, then it refused to interfere with the assessment of the trial judge who accepted the evidence of a witness whom he found to be consistent and unshaken by very severe …

[68] Also at p. 708, the Court of Appeal made the following finding:

> On the contrary, we found the learned judge justified in accepting the evidence of SP6 whom he found to be truthful, consistent and unshaken by severe cross-examination.

[69] In *Dato' Mokhtar Hashim v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101, the Federal Court held:

> First, the evidence of Atun in relation to the 1st appellant we have referred to His evidence was accepted by the learned Judge who found him to be a consistent witness unshaken by very severe cross-examination, and we can find no reason to interfere with his assessment. The credibility of a witness is primarily a matter for the trial Judge. There is a homogeneous concatenation of authority on this principle and we refer to the *locus classicus* on his aspect in a passage in the judgment of Lord Thankerton in *Watt or Thomas v. Thomas* [1947] AC 484, 487. The Privy Council said in *Caldeira v. Gray* [1936] MLJ 137, 138 that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. We feel that the following passage (at p. 138) from the judgment of the Board in that case delivered by Lord Alness bears citation *in extenso*:
>
> The appellant is exercising a right of appeal which is his by right, and their Lordships recognize that they cannot merely because the question is one of fact, and because it has been decided in one way by the learned trial Judge abdicate their duty to review his decision, and to reverse it, if they deem it to be wrong. Nonetheless, the functions of a Court of Appeal, when dealing with a question of fact, and a question of fact, moreover, in which, as here, questions of credibility are involved, are limited in their character and scope.
>
> This is familiar law. It has received many illustrations - and, in particular in the House of Lords - the most recent of these being the case of *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 243. In that case it was held that.
>
> Where the Judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better

position to judge of this matter than the appellate tribunal can be: and the appellate tribunal will generally defer to the conclusion which the trial Judge has formed.

Lord Wright, in the course of his speech, said:

Two principles are beyond controversy. First it is clear, that, in an appeal of this character, that is from the decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.

[70] Similar principle were held in *PP v. Wan Razali Kassim* [1970] 1 LNS 121, at the Federal Court held:

An appellate court should be slow to interfere with the findings of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility. As Lord Diplock had stated in *Tan Chow Soo v. Ratna Ammal* [1967] 1 LNS at p. 50.

An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment.

[71] In this case, the learned session's judge made several findings in relation to SP1's credibility, to quote;

a. keterangan SP1 langsung tidak tercabar walaupun SP1 disoalbalas bertalu-talu atas isu ini. Keterangan yang tidak tercabar ini saya terima (p. 608 Notes of Evidence, last para)

b. dari keterangan-keterangan di atas saya putuskan bahawa permintaan 3% oleh OKT untuk memasukkan sebagai pembayaran kontigensi dalam kos projek perumahan tersebut adalah satu permintaan yang dibuat secara rasuah. (p 609 Notes of Evidence, 3rd para)

c. mengikut keterangan SP1 yang langsung tidak tercabar, 3% kos kontigensi ini adalah suapan sebagai dorongan untuk OKT membantu SP1 dalam meluluskan cadangan dan kelicinan perjalanan projek perumahan tersebut yang dicadangkan oleh syarikat SP1. Keterangan SP1 ini tidak tercabar; keterangan yang tidak tercabar ini saya terima. (p. 609 Notes of Evidence, last para)

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d. keterangan SP1 in tidak langsung tercabar, bagi keterangan yang tidak tercabar ini, saya terima (p 610 Notes of Evidence, 1st para)

e. dari keseluruhan keterangan saksi-saksi pendakwa tiada seorang pun kredit mereka dicabar atau dirosakkan walaupun terdapat percanggahan atau perbezaan keterangan. Itu cuma perbezaan atau percanggahan yang kecil yang tidak boleh menjejaskan atau merosakkan kes pendakwa, Atas alasan itu, saya terima keterangan semua saksi-saksi pendakwa dan saya menolak hujah peguam OKT (p 619 Notes of Evidence, 4th para).

[72] Thus, the learned session's judge having heard and observed SP1's demeanour while under severe cross - examination, she was impressed that SP1 was a truthful witness. These finding of facts based purely on the audio-visual observation.

[73] Further, the learned session's judge had evaluated the evidence of prosecution's witnesses and concluded that their credibilities were intact. The learned session's judge appreciated there were minor inconsistencies in the prosecution evidence but those inconsistencies were minor and does not go to the root of the charge.

[74] On minor inconsistencies in SP1's evidence, the learned session's court judge made the following findings.

a. percanggahan kecil keterangan SP1 memang tidak dapat dielakkan. Mahkamah akan membuat penelitian tiap-tiap keterangan SP1 secara teliti kerana ia melibatkan persoalan "weight' untuk diberikan kepada keterangan SP1. (p 629 Notes of Evidence, 3rd para).

b. persoalannya adakah wujud perbezaan atas percanggahan keterangan itu mencukupi untuk merosakkan kredit SP1 dari keseluruhan keterangan SP1 tidak ada pula kredit SP1 tercabar atau dirosakkan (p. 629 Notes of Evidence, 4th para)

c. juga percanggahan keterangan-keterangan SP1 adalah percanggahan yang tidak material yang boleh menyebabkan SP1 menjadi saksi yang tidak boleh dipercayai (p. 629 Notes of Evidence, 4th para)

d. keterangan SP1 jua tidak tergugat apabila disoalbalas. Keterangan SP1 tidak tercabar juga sikap (demeanour) yang baik dan tetap dari mula sehingga selesai memberi keterangan. Keterangan SP1 diterima oleh saya. Atas sebab-sebab itu, saya dapati SP1 adalah saksi yang credible dan keterangan SP1 diterima oleh mahkamah (p 619 Notes of Evidence, last para).

[75] The above quoted evidence shows the learned session's judge had tooth combed evidence of SP1, considered in details the inconsistencies and decided it is safe to act on it and called the accused to enter for his defense on all the principal amended charges.

[76] Further, the learned session's judge directed her mind on all relevant issues in deciding to convict the accused. Thus, this court is fettered or not in a position to disturb the findings made by the learned session judge, that is, SP1 is an honest and straight forward witness.

[77] The facts that SP1 is an honest witness is disclosed during the cross examination when SP1 admitted that there was a pending civil suit between Hosana Constructions Sdn Bhd and Sonati (SP1 was the owner of Sonati). SP1 unhesitant and unequivocally admitted that Sonati owed some payments to the former for work done. This is judicial admission which can be used by Hosana Constructions in the impending civil suit. SP1 has no fear to admit that he owes Hosana the payment. This piece of evidence speaks volume of his credibility.

Evidence Relating To The 4th Principal Amended Charge

[78] Whether the golf set was loaned to the accused or given for free to him without consideration depend very much on the backdrop of the case. In order to determine whether the golf set was indeed borrowed to the accused, it is necessary to look at the evidence in totality and evidence must be cross tested. The defence of loan by the accused is an ingenious attempt by him to guise his '*mens rea*' and "*actus reus*": see *Kanapathy v. Regina* [1960] 1 LNS 167.

[79] Based on the evidence of SP1, SP2 and SP3, their evidence clearly showed, that the golf set was actually given to the accused without any consideration. It would be ludicrous to

A suggest that SP1 and SP2 bought the set specifically for the purpose of borrowing it to the accused. Instead the printed evidence revealed that the golf set was given for free to the accused.

B **[80]** There was also unchallenged evidence that prior to the date of the purchase, the accused had been to the said shop and identified the said golf set. The big question is - why the accused did not buy the golf set then? Why must the accused wait for SP1 to come along to the shop to purchase it? The answer is C obvious. The accused wanted SP1 to pay for him.

[81] Since the date of the purchase, no attempt was made by the accused to pay for the golf set. The accused was holding the position YDP of MPK and both MPK and Sonati have dealing at the material time. The accused's conduct of smiling and looking at D SP1 and SP2 clearly indicative of asking them to pay for the golf set.

[82] Haron bin Ariffin, SP13's evidence cannot lend credence to the defence that he was instructed by the accused to return the E golf set to SP1 as SP13 is a close associate of the accused and this was admitted by the defence in D19. SP13 was a partisan witness.

[83] The defence had conceded that the golf set was given to F the accused. Therefore, the said presumption applies, that is, the golf set was deemed to be given without consideration. There is not *an iota* of evidence adduced through the prosecution witnesses to rebut the said presumption. It is highly improbable to suggest the golf set was loaned to the accused as the accused himself had G called SP1 and SP2 all the way from Kuala Lumpur to buy the golf set. Viewing at the factual matrix, the irresistible inference is that the golf set was given to the accused for free.

[84] Another important question to be considered is whether H SP1 and SP2 would buy something which they could not afford to pay in cash, subsequently loaned the set to someone else. They even had to get the assistance from Uncle Robert to convince the shop owner for a deferred payment.

[85] The timing of buying of the golf set coincided with the date I of a golf tournament known as 'Piala YDP'. This evidence raised the inference that the accused needed the golf set badly as the tournament was around the corner.

Defence Corroborated Prosecution's Case

[86] The evidential value of defence exhibits which was tendered and marked during prosecution's case cut both ways. The prosecution is at liberty to rely on defence exhibits tendered during its case as corroborative evidence. Exhibit D19 was tendered and marked by the defence through SP1. Looking at D19, it clearly shows that the accused did receive RM50,000 and a further sum of RM25,000. D19 also confirmed SP'1s evidence of a meeting at City Bay View Hotel, Pulau Pinang on 6 April 2000 and the accused told SP1 to backdate it to 15 December 1999.

Accused Manufactured Evidence In Anticipation Of An Investigation By ACA

[87] Viewing the evidence in its totality, one would be able to see that the accused started to marshal his defence as early as 6 April 2000 (ie, the date of meeting at City Bay View). The evidence of SP1 coupled with D19, it is apparent that the accused decided to put up the defence of a "loan' should he be investigated or charged. That explained why the accused instructed SP1 to backdate D19. It is an ingenious attempt to explain away his defence.

[88] Further, the conduct of the accused in requesting SP1 to backdate D19 and to furnish only favourable documents to the investigating officer when his premises was searched is admissible under s. 8(2) Evidence Act: see *Chandrasekaran & Ors v. PP* [1970] 1 LNS 11, *Yeo Hock Cheng v. Rex* [1938] 1 LNS 118, And in law, deliberate lie can amount to corroboration: see *Syed Ali bin Syed Abdul Hamid v. PP* [1982] [1982] CLJ 188; [1982] CLJ (Rep) 340 and *Tan Ping Seng v. PP* [1998] 1 SLR 418.

[89] Looking at the way the prosecution witnesses were cross examined especially SP1, it cannot be doubted that "loan" is a major plank of the defence case. Those money were given to salvage the accused from financial problem. Of all the persons he opted to obtain the "loan" was SP1 who had an official dealing with him. The accused made no attempt to apply bank loan, but instead demanded money from SP1 without any formal written agreement being prepared. Suddenly, out of the blue the accused wanted to pay only for RM30,000 which his wife SP7 had cashed the cheque for the same amount.

[90] Under the circumstances, the prosecution had successfully established *prima facie* case against the accused on all the charges - 1st, 2nd, 3rd and 4th principal amended charges.

Evidence Relating To The 2nd Alternative Charge And 3rd Alternative Charge

[91] The defence also conceded to the fact that the accused had accepted the sum of RM25,000 which formed the subject matter of the 2nd alternative charge. The concession was evident during cross examination of SP1. SP2 too, was not cross examined on the 2nd alternative charge. Failure to cross examine a witness on a crucial point of the case will amount to an acceptance of the witness testimonies: see *Wong Swee Chin v. PP* [1980] 1 LNS 138.

[92] The accused did not dispute that the money was indeed received by the accused, the subject matter of the 3rd alternative charge. This is seen in the cross examination of SP1 as follows:

Q - Bila dia minta 60,000 kenapa tak buat report

A - Dia minta tolong untuk bayar hutang kereta, credit card dan kalau tidak tolong dia akan ada masalah.

Q - Sebagai seorang kawan, kamu tolong OKT dengan memberi pinjaman.

A - Bukan pinjaman. Saya bagi wang.

PUT: Yang sebenarnya kamu bagi kepada OKT adalah RM25,000 pada awalnya di KL dan 50,000 lagi di Perlis dan bukan RM60,000.

A - Tidak setuju. RM25,000 dan kemudian RM60,000.

[93] However, SP1 gave an explanation in re examination why in D19 he wrote RM50,000. While in his oral evidence he said RM60,000.

[94] Be that as it may, the undisputed evidence shows that the accused had official dealing with SP1, with such official relationship, how on earth the accused defence of "innocent loan" be a valid defence. There was evidence that the accused did refund the amount of RM30,000 but it was done to build up his defence upon being investigated by the authority. Perhaps, a cursory reading of D19 will give an impression that it was a loan. Upon further probe, it will show it was not in return of the loan

but an attempt to cover-up his misdeed. Having considered the evidence as a whole with practical and pragmatic approach, it will nullify any suggestion that it was a loan.

[95] The evidence adduced by the prosecution was credible and believable. The star witness for the prosecution, SP1 emerged unscathed despite having been subjected to search cross examination by the defence. SP1 was an honest witness. The evidence adduced by the prosecution coupled with D19 and the presumption under s. 42(3) ACA 1997, a *prima facie* case has been made out on all the four principal amended charges preferred against the accused. The learned session's court judge was right in calling the accused to enter his defence.

Defence

[96] The accused had elected to give evidence on oath and called three witnesses. Basically the accused denied that he corruptly solicited 3% as gratification for himself. He said that the monies that he received from SP1 were personal loan. As to the golf set paid by SP1, the accused said that it was borrowed or lent by SP1 to him to see whether it suited him.

[97] 1st Principal Amended Charge

The defence of the accused against the 1st principal amended charge was merely bare denial. The circumstantial evidence adduced by the prosecution and the accused evidence itself supported the fact that the accused demanded the 3% as gratification. The circumstantial evidence showed that the accused was in a position to commit and had committed the offence. The evidence are:

1) The accused's admission that he was deep in debts at the time when he was appointed as YDP MPK.

2) Evidence also showed how easy and fast it was for the accused to make decision, even though in principle, without referring to the committee members in MPK. The decision was made by the accused alone.

3) The project to develop the Padang Besar land as joint venture was a housing project and it did not require a hurried or expeditious decision. According to SP11, it was a first housing project carried out by MPK. SP11 could not recall any of

A MPK departments having sat to deliberate on the proposal. The accused did not explain why he was quick in making the decision.

4) In his defence, the accused also advanced the evidence to
B show that he was not aware of SP1's proposal when he met SP1. This evidence went against the defence own witness, DW2. DW2 said that the idea to develop the said land came from the accused. This is a clear contradiction in the defence evidence.

C 5) SP1 stated that the accused solicited the 3% gratification not once but in series of discussions.

6) There was no legal action either in the form of court action or letter of warning have been taken or issued against Sonati
D for the breaches which were alleged to have been committed when Sonati was carrying out the project even though the grounds stated in P9 to terminate the joint venture project have shown that Sonati had breached the laws. This lent support to the promise made by the accused that he would
E facilitate the smooth running of the project. This occurred between February to October 1999 during the time when payments of RM25,000, RM30,000 and a cheque of RM30,000 and the golf set were made toward the satisfaction of 3% solicited by the accused. It may be noted that in the
F joint venture agreement, P39A, para. 3.0(a) the termination should have been made within three months but it was not done. Similarly, with regard to para. 3.0(b) which should be done in one month.

G **[98] The 2nd and 3rd Principal Amended Charges**

The defence of a loan was merely concocted by the accused. No documentary proof to show that the monies taken were as loans. Was the accused in heavy debts? It was only his words. When
H requested by the prosecution for documents to show that there was such a loan or debt, the accused simply replied that he had lost the documents even though he said that the loan was still unsettled. It is rather odd to expect someone like the accused who was shackled in debts to take further loan.

I **[99]** The accused defence of a loan was an attempt to persuade the court to believe him that he was in dire financial difficulty and needed to settle the loans when there were talk of him standing

as candidate for the general election. At the same time, the accused continued to take loan to purchase a Pajero jeep which necessitated him to pay at a fairly high monthly instalments.

[100] It was also difficult to comprehend that SP1, whom the accused alleged had no money to carry out the shore embankment project at Kuala Perlis and no sufficient funds to carry out the joint venture project with MPK, would want to lend money to the accused, if we were to believe that the money was a loan. As a result of satisfying the demand of the accused, Sonati found it difficult to pay its contractor, Hosana Construction for the works done.

[101] It is also highly improbable to believe that SP1 had lent money to the accused when Sonati was having difficulty in financing the joint venture project. Therefore, the money were paid as gratification to the accused and not as loan as alleged by the accused.

[102] The prosecution contended that P7 was fabricated by the accused to safeguard himself by giving misleading fact as to when it was made and that the money was a personal loan, even though SP1 admitted that he wrote the contents of P7 as the accused had asked him to prepare P7. It was the accused who determined what contents to write. P7 was prepared and RM30,000 returned by the accused to SP1 was clearly gratification received by him. The amount tallied with the sum received by cheque, P7. Evidence showed that the cheque was cashed by his wife, SP7. At the time the accused returned the money at City Bayview Hotel, he already knew that MPK would decide to terminate the joint venture project with Sonati and would be giving the project to Hosana. The meeting at the hotel took place on Thursday 6 April 2000 and the MPK's meeting was scheduled on Saturday 8 April 2000. The accused knew about the meeting as he had received a memo of the meeting on 30 March 2000. Therefore, the accused sensed the need to protect him and that led to P7 to be written by SP1.

[103] The sum of RM30,000 in cash and another amount of RM30,000 by cheque were gratification as an inducement as payment towards the promise by the accused to assist the smooth running of the joint venture project. As stated earlier, the accused or MPK did not have any complaints against SP1 or Sonati between June and October, 1999. The project proceeded in its

normal course, even though there were several breaches of MPK's bye-laws. This situation was tolerated up to when MPK decided to terminate the joint venture agreement. It was then that the accused or MPK felt that they needed to use the breaches as the ground to terminate the agreement.

[104] Assuming for a moment if the money that the accused received from SP1 were personal loan as he alleged, the question is why he did not mention the other amount that he received by cash in P7. Until the accused testified in court, the money was not repaid by him. Therefore, the money was received as part of the 3% that he demanded from SP1.

[105] The receipt of RM25,000 in cash immediately after the agreement was signed was a clear indication that it was a bribe to the accused. At the time of its receipt, the accused wanted to go oversea. It is not sensible for someone to accept that amount of money that was supposedly to be used to repay debt when he intended to go oversea. The accused admitted that he had bank account but none of the money that he received from SP1 was deposited into his bank account or that it was used to pay his debts. The accused was clearly telling a lie about his indebtedness. Instead the RM25,000 was part of the 3% which the accused term it as "contingency amount" and it was as a reward for him signing the agreement and his assurance for the smooth running of the project. This is evidenced from the fact that the demand for the RM25,000 was made a few days before he came to Kuala Lumpur. It would be easier for the money to be banked in his account if it was true that the loan is genuine or *bona fide*. Instead, what happened was that immediately after the agreement was signed, the RM25,000 was paid, and the said sum was paid in the car whilst they were on the way for lunch. The agreement was signed without clear authority from MPK Council and the agreement was not scrutinized by its legal officer.

[106] The allegation by the accused through DW4 was not put to SP1 in particular with regard to the following evidence.

> Before the contract was awarded to Hosana by MPK, I did talk to SP1. He called me. He was not happy the contract was given to Hosana. SP1 did mention that he have loaned the money to OKT. He did not elaborate exactly the amount. He was very unhappy because he was terminated "Saya tak akan lepaskan projek ini dalam aman ..." OKT is a political man, his name will be smeared - so Joe you will not be happy on this project.

[107] This fact was not put to SP1. It only arose for the first time when DW4 was giving evidence. For someone who could not recall the date his company (Hosana Sdn Bhd) was incorporated and was not able to remember the paid up capital but could recall exactly what SP1 had said to him. DW4 was obviously a doubtful witness, especially with regard to the conversation which he claimed he had with SP1

[108] On the other hand, SP1 was honest and credible witness, SP1 was not the complainant in this case. Instead, evidence has been shown that his premise had been searched by the ACA. The only complaint he had was to the then Menteri Besar (MB) of Perlis through his letter dated 11 April 2000, D19. He only requested for the MB to intervene and to settle the problem between Sonati and MPK.

[109] Hence, the accused had failed to rebut the presumption under s. 42(3) ACA 1997 that had been raised against him on the balance of probability. The accused had also failed to cast a reasonable doubt against the prosecution case and therefore the prosecution had succeeded in proving the case against the accused on the 1st, 2nd, 3rd and 4th principal amended charges beyond any reasonable. I see no reason to disturb the convictions imposed by the learned session's court judge on the accused.

[110] As regard the prosecution appeal on sentences, I, accordingly, amend the sentences on fines in respect of 1st, 2nd and 3rd principal amended charges having regard to s. 16(b) of the ACA 1997 as follows:

1) 1st Principal Amended Charge

   Four years' imprisonment with effect from today (ie, 20 November 2009) and fined RM1.5 million in default of which 24 months imprisonment.

2) 2nd Principal Amended Charge

   Three years' imprisonment with effect from today (ie, 20 November 2009) and fined RM125,000 in default of which 6 months imprisonment.

3) 3rd Principal Amended Charge

   Four years' imprisonment with effect from today (ie, 20 November 2009) and fined RM300,000 in default of which 13 months imprisonment.

A 4) 4th Principal Amended Charge

Fined RM20,000 in default of which four months imprisonment (This sentence remained unamended as s. 16(b) of the ACA 1997 is inapplicable).

B The imprisonment terms of 1st, 2nd and 3rd Principal Amended Charges were to run concurrently.

[111] I, therefore, dismissed the accused's appeal on all the 1st, 2nd, 3rd and 4th principal amended charges and allowed the C prosecution cross-appeal on sentences on fines in respect of the 1st 2nd and 3rd principal amended charges. The prosecution did not propose to proceed with the cross appeal on sentence on the 4th principal amended charge.

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